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A. Assignments of Error

1. The trial court erred by holding that Appellant is barred from litigating her age discrimination and retaliation claims because she previously had litigated an unfair labor practice case before the Public Employment Relations Commission (PERC).
2. The trial court erred by failing to apply a “mixed motive” standard applicable to employment discrimination cases.
3. The trial court erred by concluding that the issues in the PERC proceeding were identical to issues before the trial court.
4. The trial court erred in granting Respondent’s motion to bar re-litigation of all issues resolved adversely to Appellant before PERC.
5. The trial court erred in failing to rule that Appellant’s allegations of discrimination were continuing in nature.
6. The trial court erred in granting Respondent’s Motion for Summary Judgment.

B. Issues Pertaining to Assignments of Error

1. Where an employer's discriminatory acts against an employee may be motivated by anti-union animus and/or by age-bias, is the employee entitled final resolution of which motivation caused the illegal action in order to acquire the statutory relief to which she is entitled? (Assignment of Error Nos. 1 and 2)

2. Where a PERC examiner with no jurisdiction over or expertise in age discrimination issues decides that an employee was not subjected to anti-union conduct, should the employee be foreclosed from exercising her statutory right to have her age discrimination case decided by a jury? (Assignment of Error Nos. 1, 4, and 6).

3. Where two statutes regulating workplace conduct have entirely different purposes and public policies, should the court consider the issues brought under such statutes identical? (Assignment of Error Nos. 1, 3, and 6).

4. Do the different purposes and policies inherent in the Washington Law Against Discrimination (WLAD) warrant the conclusion that application of the doctrine of collateral estoppel would work an injustice upon a victim of age discrimination? (Assignment of Error No. 1, 3, 4, and 6).

5. Where the risk of causing an employee emotional distress was foreseeable to the employer, did the trial court err in dismissing her negligent infliction of emotional distress claim? (Assignment of Error No. 6).

6. Where the record contained unrefuted evidence of ongoing discrimination and retaliation, was it error for the trial court to enter summary judgment based on collateral estoppel? (Assignment of Error No. 6).

C. Statement of the Case

This case was filed in August 2005 as an age discrimination and retaliation case pursuant to RCW 49.60 (WLAD)(CP 1-5).¹ Plaintiff, Carole Jordan had earlier pursued remedies before the Public Employment Relations Commission for unfair labor practices (ULP) committed by her employer, Lower Columbia College (LCC) (CP 232-235). Although the ULP case had been litigated before a PERC Examiner at the time Appellant filed her WLAD case, the two proceedings overlapped. On November 18, 2005, the PERC Examiner issued his ruling on the ULP proceeding, recommending dismissal of Ms. Jordan's charges (CP 21-43).

¹ The term "CP" with a number there following refers to the Clerk's Papers designated by the parties. The pages have been numbered consecutively, beginning with the Complaint (Sub. Num. 5).

On December 5, 2005, Ms. Jordan filed a timely appeal to PERC (CP 45-49).

Plaintiff's case proceeded before the Superior Court in Thurston County during which the parties engaged in discovery. On July 13, 2006, LCC filed its Motion for Summary Judgment For Collateral Estoppel (CP 136-146). On August 11, 2006, the trial court entered an order granting the motion in some respects but deferring a ruling on collateral estoppel until after PERC ruled on Ms. Jordan's appeal in the ULP case (CP 168-169). On August 15, 2007, the trial court was advised that the PERC decision had issued, denying any relief to Ms. Jordan under the Public Employee Relations Act, RCW 41.56 (CP 190).

By letter dated August 31, 2007, the trial court issued a letter opinion stating that it would issue a decision without further argument, but permitting either party to submit additional materials (CP 170). On September 20, 2007, pursuant to the court's ruling, Appellant submitted a declaration substantiating additional and on-going acts of discrimination and retaliation (CP 171-177). On November 2, 2007, the trial court issued another letter opinion granting "Defendant's motion to bar re-litigation of all issues resolved adversely to Plaintiff before PERC[,]" but noting that "if Plaintiff can present evidence to show other bases of discrimination, her case can proceed without evidence of the acts alleged and ruled upon

by PERC” (App. pp. 1-3).² The trial court continued: “If there is no other evidence, Defendant is entitled to summary judgment” (*Id.*).

Ms. Jordan had submitted other evidence of discrimination. She also moved to amend the complaint to add as an additional party, another older employee of Lower Columbia College, who, like Jordan, had been summarily removed from her office and pressured to retire (CP 178-187). The trial court denied the motion to amend and, despite Appellant’s submission of additional evidence of discrimination, granted summary judgment (CP 188-190). Ms. Jordan timely appealed those ruling to this Court.

D. Statement of Facts

Appellant Carole Jordan is a 62 year old single woman who, after divorce from a long marriage, returned to school to train for a career in graphic design. She has been employed by LCC for six years, and is now 3 years away from her earliest retirement date. She earns a modest income and is her sole source of support.³ Because she did not begin her career until middle age, her retirement savings are meager. (CP 158).

After she began work for LCC in 1997, she began to experience age discrimination from her younger supervisor. For example, she was accused

² The trial court’s November 2, 2007 letter is appended to this brief.

³ Unless otherwise noted, all factual statements are supported by the Jordan Declaration (CP 158-160).

of having a faulty memory – an obviously ageist remark. LCC management did nothing about it. As a result, Ms. Jordan filed a charge of age discrimination with the Washington State Human Rights Commission. Thereafter, when her supervisor, Janelle Runyon, hired younger employees and treated them more favorably than Jordan, Jordan filed another such charge. In 2004, Jordan filed yet another charge with the U.S. Equal Employment Opportunity Commission (EEOC). (CP 159).

Although her work situation had been difficult before she filed the EEOC charge, thereafter it deteriorated further. The hostility that she was experiencing from Janelle Runyon and lead-worker Joanne Booth escalated to the point where Ms. Jordan felt that her job was in jeopardy. Job assignments were not fully described so that she worried that she was being set up to fail. Runyon and/or Booth withheld work until the deadline was short; or made assignments with deadlines that were virtually impossible to meet. Mistakes made by others were blamed on her.

At times Runyon and/or Booth loaded her with work and at other times withheld work from her so that she had nothing to do. This course of conduct felt to the Appellant akin to water torture. Finally, after the EEOC dismissed her charge, LCC transferred her to a different position without high-end design work, further leading her to fear that dismissal or reduction-

in-force was imminent. Ms. Jordan's former job responsibilities were assigned to younger, less qualified employees. (CP 159-160).

During this same period of time, Appellant had been active as an officer of her union. In February 2004, PERC issued a decision finding that LCC had committed an unfair labor practice by attempting to lay Ms. Jordan off in 2004, a decision that was publicized in the local media. Thereafter, when the LCC President threatened her job if she persisted in "making the College look bad," Ms. Jordan filed another unfair labor practice charge with PERC alleging that it was retaliating against her for her union activity in violation of RCW 41.56. (CP 160). The PERC Hearing Officer ruled against her (CP 86-109). His decision was subsequently upheld by the Commission (CP 188).

As we show below, the PERC case and this case are dissimilar, involve different issues and very different public policy issues, and can lawfully be brought before different tribunals.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT

LCC moved for summary judgment seeking collaterally to estop Ms. Jordan from pursuing her age discrimination claim and to dismiss her claims of retaliation, violation of her free speech rights, and negligent infliction of emotional distress. The net effect was to dismiss the case in its entirety. The burden of showing that there were no disputes of material fact rested on LCC. When considering a motion for summary judgment, a trial court must consider all the facts in the light most favorable to the non-moving party, in this case, Appellant. *Sellsted v. Washington Mutual Savings Bank*, 122 Wn.2d 1018, 863 P.2d 1352 (1993).

Summary judgment is appropriate **only** if there is no genuine issue as to any material fact, with all reasonable inferences made in favor of the non-moving party. The moving party bears the burden of showing there is no material fact at issue. *Safeco Insurance v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992). A material fact is one upon which the outcome of the litigation depends. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). Only when reasonable minds can reach but one conclusion may summary judgment be granted. *Ruff v. King County*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995).

On appeal, this Court reviews summary judgment motions *de novo*. *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 833, 906 P.2d 336 (Div. II, 1995). Thus, the appellate court engages in the same inquiry as the trial court. *Green v. Normandy Park Riviera Section Cmty. Club, Inc.*, 137 Wn. App. 665, 681, 151 P.3d 1038 (Div. II, 2007), *rev. denied*, 163 Wn.2d 1003 (Mar. 4, 2008).

Washington courts have noted that summary judgment should rarely be granted to employers in employment discrimination cases, such as this one. *Johnson v. Department of Social & Health Services*, 80 Wn.App. 212, 226, 907 P.2d 1223 (Div. II, 1996); *Sellsted supra*; *deLisle v. FMC Corporation*, 57 Wn.App. 79, 84, 786 P.2d 839 (Div. I, 1990), *rev. den.* 114 Wn.2d 1026 (1990). In the court below, LCC failed woefully to show the absence of disputed facts. And when the record before the trial court is viewed in the light most favorable to Appellant, it is apparent that the court below erred in granting LCC's motion for summary judgment herein.

II. THE TRIAL COURT ERRED IN CONCLUDING THAT COLLATERAL ESTOPPEL APPLIED

Whether collateral estoppel applies to bar re-litigation of an issue is reviewed *de novo* on appeal. *Christensen v. Grant County Hospital*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). A party who asserts collateral

estoppel has the burden to prove it. *McDaniels v. Carlson*, 108 Wn.2d 299, 303-04, 738 P.2d 254 (1987). To do so, the moving party must convince the court that an affirmative response to all of the following questions is warranted:

(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

Rains v. State, 100 Wn.2d 660, 665, 674 P.2d 165 (1983). For an issue to be precluded, it must have been actually litigated and necessarily determined in the prior litigation. *Peterson v. Department of Ecology*, 92 Wn.2d 306, 312, 596 P.2d 285 (1979). The last factor – the so-called “injustice factor” – “recognizes the significant role of public policy” *State v. Vasquez*, 109 Wn. App. 310, 34 P.3d 1255 (Div. III, 2001), *aff’d*, 148 Wn.2d 303, 309, 59 P.3d 648 (2002). All four questions must be answered in the affirmative for a court to grant the moving party’s motion for collateral estoppel. *Id.* Here, LCC failed to meet the requirements set forth in numbers (1) and (4).

The legal issue litigated before PERC involved whether LCC had committed an unfair labor practice due to Carole Jordan’s union activity, in violation of RCW 41.56; the legal issue before the trial court was whether LCC discriminated against Carole Jordan because of her age, in violation of

RCW 49.60. These are very different issues – both in terms of the respective statutes involved and in terms of the discrete public policies involved.⁴ Employment discrimination cases often present situations, as here, where the employer’s actions may have been prompted by more than one unlawful motive. These cases are judicially described as “mixed motive” cases. *See: Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989); *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302; 898 P.2d 284 (1995).

In *Mackay, supra*, our Supreme Court held that discrimination in violation of WLAD did not have to be the sole or even determinative motivation, and that it could co-exist with other motivation, such as the anti-union animus present in this case. In a “mixed motive” case such as this one, a plaintiff can prove her WLAD case simply by showing that discrimination was a substantial factor in the employer’s reasons for engaging in the prohibited conduct. Thus, under Washington law, PERC issues and WLAD issues can be presented in the same fact scenarios without collateral estoppel barring the pursuit of either case, or both.

⁴ Although unfair labor practice statutes and unfair employment practices statutes both use the terms “discriminate” and “retaliate,” the practices to which each refers are inherently different. The discrimination and retaliation prohibited by labor statutes is that based upon the employee’s union activities; the discrimination and retaliation prohibited by employment statutes is that based upon race, sex, age, etc., and upon activities taken to complain about such discrimination.

Mackay, supra; accord: Allison v. SHA, 118 Wn.2d 79, 821 P.2d 34 (1991).

Disregarding the weight of applicable case law, the trial court relied on *Christensen, supra*, as authority to the contrary. The *Christensen* case is clearly distinguishable. In that case, Christensen had pursued his termination as an unfair labor practice before PERC, and after exhausting all remedies there, lost. He then filed a case in court alleging that his discharge constituted wrongful discharge in violation of public policy.

The public policy on which he relied was that contained in the same labor statute under which he had brought his PERC case, codified in RCW 49.32.020. Since the public policy on which both the PERC proceeding and the court proceeding were based was identical, the *Christensen* court held that collateral estoppel applied.

In the case at bar, Ms. Jordan did not bring her action based on wrongful discharge in violation of the public policy inherent in the labor statutes. Rather, she brought her case based upon WLAD, which has public purposes and goals separate and distinct from those contained in the labor statute upon which her PERC case was based. The purpose of the labor statute is to guarantee “full freedom of association, self-organization, [etc. and to guarantee that employees] shall be free from interference,

restraint, or coercion of employers of labor . . .” based upon their union activities. The purpose of WLAD is to prohibit:

. . . practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, age, or the presence of any sensory, mental, or physical disability [etc., because] . . . such discrimination threatens not only the rights and proper privileges of [Washington’s] inhabitants but menaces the institutions and foundation of a free democratic state.

To further insure that judicial doctrines such as collateral estoppel would not thwart the sweeping public policy of WLAD, the Legislature added Section 49.60.020 which provides:

Construction of chapter – Election of other remedies

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of any other law. . . . Nor shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights.

Thus, by legislative design, collateral estoppel should not be used to prevent a victim of discrimination such as Carole Jordan from pursuing her WLAD claim in the Washington courts. Our courts have held that: “if a legislative body indicates its intent on the matter of preclusion, that intent generally controls whether the judicially applied doctrine of collateral estoppel will apply.” *Christensen*, 152 Wash.2d at 314-315. The statute sets forth clear legislative policy that the right to pursue

WLAD cases should be unfettered. *See also: Smith v. Aufderheide*, ___ F.Supp. ___, 2008 U.S. Dist. LEXIS 11837 (W.D. Wn. 2008).⁵

Such policy appropriately should be considered as applicable to the fourth collateral estoppel factor, the so-called “injustice factor” – which, as noted above, “recognizes the significant role of public policy.” *Vasquez, supra*. Thus, because it could not meet the requirements of either factor one or factor four of the collateral estoppel requirements, LCC’s motion as to Jordan’s WLAD claims should have been denied.

Federal law is similarly compelling. *See e.g.: Washam v. J.C. Penney Co.*, 519 F.Supp. 554 (D.Ct. Del. 1981). In *Washam*, allegations that two Black employees had been discharged because of union organizing activities had been litigated before the National Labor Relations Board. Noting that even though the legislative history of Title VII (42 USC §2000(e) *et seq.*), and its subsequent judicial construction made plain that Congress intended to allow discrimination claims to be brought both to the NLRB and in court, because the jurisdiction of the NLRB is limited to union activities, the Court held that neither *res*

⁵ In that case, interpreting Washington law, the court denied a summary judgment request to bar a plaintiff from proceeding on his wrongful discharge and discrimination claims in federal court because he had litigated the same issues in a hearing before the Department of Employment Security.

judicata nor collateral estoppel applied.⁶ Similarly, in *Colindres v. Quietflex Mfg.*, 235 F.R.D. 347, 361-62, 2006 U.S. Dist. LEXIS 19781 (S.D. Texas 206), the Court held:

Claim preclusion does not bar the plaintiffs' retaliation claims in this case because the plaintiffs could not have raised those claims in the NLRB proceeding. The NLRB decision dealt with an alleged violation of the National Labor Relations Act, not with an alleged violation of Title VII's antiretaliation provision. "Although these two acts are not totally dissimilar, their differences significantly overshadow their similarities." *Tipler v. E.I. duPont deNemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971) (citing *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969)). The "purposes, requirements, perspective and configuration" of these two statutes differ. *Id.* at 129. "Title VII and the NLRA [29 USC §151 *et seq.*] are statutes with separate and independent remedies. . . . Though Title VII and the NLRA may overlap in the area of employment

⁶ The *Washam* Court stated [519 F. Supp. at 558]: "Although the courts have recognized the NLRB's role in combating racial discrimination in the workplace, *see e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, note 9 at 48, 94 S. Ct. 1011, note 9 at 1019 (1974); *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 65 S. Ct. 226 (1944); *United Packinghouse v. N.L.R.B.*, 416 F.2d 1126 (D.C.Cir.) cert. denied, 396 U.S. 903, 90 S. Ct. 216 (1969); *Cargo Handlers*, 159 N.L.R.B. 321 (1966); *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, note 18 at 650, note 19 at 650-51 (5th Cir. 1974); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C.Cir.1973), this rule is limited by the ambit of the NLRA. As the court wrote in *United Packinghouse*, *supra*, 416 F.2d at 1135:

In order to hold that employer racial discrimination violates Section 8(a)(1) it must be found that such discrimination is not merely unjustified, but that it interferes with or restrains discriminated employees from exercising their statutory right to act concertedly for their own aid or protection, as guaranteed by Section 7 of the Act.

Thus, the NLRB's jurisdiction over race discrimination claims is predicated on the impact of the alleged discrimination on the enjoyment of rights secured to employees under Section 7 of the NLRA. The absence of such an impact from a racially motivated discharge of a supervisor places such a discharge beyond the jurisdiction of the NLRB."

discrimination, their confluence must not be exaggerated. A plaintiff does not lose his right to an adjudication regarding the causes of action created by Title VII simply because the conduct of which he complains also offends section 8 of the NLRA.” *Britt v. Grocers Supply Co., Inc.*, 978 F.2d 1441, 1447 n.9 (5th Cir. 1992). The plaintiffs did not, and could not, ask the NLRB to determine whether Title VII prohibited QuietFlex's decision to fire employees who had participated in the walkout. Claim preclusion does not bar plaintiffs' retaliation claim in this action.

Like the NLRA and Title VII, Washington’s labor statutes and the Washington Law Against Discrimination have differing “purposes, requirements, perspective and configuration” . . . “with separate and independent remedies.” Carole Jordan, like Fermin Colindres, “did not, and could not, ask [PERC] to determine whether [WLAD] prohibited [LCC’s age discriminatory conduct toward her]. This Court should hold that claim preclusion does not bar Appellant’s discrimination claims under WLAD.

III. APPELLANT SHOULD HAVE BEEN PERMITTED TO PURSUE HER NEGLIGENT INFLICTION CLAIM

In the court below, LCC cited *Snyder v. Medical Service Corp.*, 145 Wn.2d 233, 35 P.3d 1158 (2001) as establishing a global rule that no negligent infliction of emotional distress case can be brought in an employment context. It is wrong. Although the *Snyder* court held that in most employment cases, such claims could not be pursued, it carefully carved out from that holding those situations where, as here, the defendant’s

conduct creates *foreseeable* danger to the recipient. *Id.* at 245. The conduct described in Jordan's declaration can be construed as creating foreseeable consequences to her, particular given the fact that at summary judgment she was entitled to all reasonable inferences from the evidence before the trial court. *Safeco, supra.* Her negligent infliction claim should not have been summarily dismissed.

IV. ALLEGATIONS OF CONTINUING DISCRIMINATION PRECLUDED DISMISSAL OF THE CASE

In its Memorandum in Support of Proposed Order on Summary Judgment, LCC claimed that Jordan's case should be dismissed in its entirety because the trial court had disposed of the claims that she made before PERC and that since she had not moved pursuant to CR 15(d) to supplement her pleadings to add facts occurring after the Complaint was filed (CP 211-214). Defendant's argument was not well founded, and the court below erred in adopting its reasoning.⁷

Citing *dicta* from a case from Hawaii, LCC asserted that a "cause of action" should be construed as "the fact or facts which give a person a right to judicial redress or relief against another," citing *Firemen's Fund v. AIG*, 109 Hawaii 343, 357, 126 P.3d 386 (2006). Consequently, LCC argued,

⁷ LCC asserted that "[c]hanges to a plaintiff's complaint designed to add facts after the filing of the original complaint need to be made . . . in a motion to serve a supplemental pleading" (CP 213). It provided no case authority for the proposition that such practice is mandatory. As shown above, it is not.

because Jordan's Motion to Amend stated that her Amended Complaint "includes no causes of action that were not included in the original complaint," she had thus restricted her "causes of action" to exclude any subsequent facts. This assertion was belied by the face of Jordan's Complaint.

The Complaint lists four causes of action: age discrimination, retaliation, violation of free speech, and negligent infliction of emotional distress (CP 2-4). Washington is a notice pleading state. CR 8. It is therefore not necessary for a complaint to set forth detailed facts supporting the plaintiff's cause(s) of action. *Schoening v. Grays Harbor Community Hospital*, 40 Wn.App. 331, 698 P.2d 593 (Div. II, 1985); *see also: Dewey v. Tacoma School District*, 95 Wn.App. 18, 974 P.2d 847 (Div. II, 1999).

Here, the Complaint sets forth facts that entitle Appellant to relief: She is over 40 and "throughout her employment, she has been treated less favorably than younger, less qualified employees" (CP 2, ¶¶ 3.1, 3.2). These facts put LCC on notice that Jordan was bringing an age discrimination case. No additional facts need to have been pled, and any evidence of disparate treatment, whether it occurred in 2005 or yesterday, could be introduced at trial. If that were not the case, according to LCC, a plaintiff would have to

file repetitive CR 15(d) motions whenever the defendant engaged in yet another disparate action.⁸

Nonetheless, it should be noted that the Complaint makes it obvious that the disparate treatment is continuing by using the term “throughout her employment.” Since Ms. Jordan is still employed by LCC, the period of discrimination demarcated by the Complaint is on-going.

The same is true with respect to the retaliation claim. The phrase “since filing with the EEOC” clearly suggests that it is a continuing violation. So too, the NIED claim states that she “has suffered and continues to suffer” (CP 4, ¶ 7.3).

Equally spurious was LCC’s assertion that “[u]nder the doctrine of ‘claim splitting’ [Appellant] should not be allowed to raise any new factual allegations that could have been heard in the PERC appeal” (CP 214). “Claim splitting” is defined as filing two separate lawsuits based on the same event. *Sprague v. Adams*, 139 Wn. 510, 515, 247 P. 960 (1926). For example, parties injured in an automobile accident cannot bring one law suit for personal injuries and another for property damage. *Landry v. Luscher*, 95 Wn.App. 779, 976 P.2d 1274 (Div. III, 1999). Appellant’s case herein does not involve “claim splitting” because the conduct alleged is not a single

⁸ In contrast, if a new cause of action accrued, an amendment would be required to aver facts and prerequisite elements in order to permit the new claim to proceed to trial. *Dewey, supra*.

isolated tort from which Ms. Jordan alleges different claims; but rather multiple discrete torts, each one of which is alleged to be disparate treatment or retaliation.

Nor could these “new factual allegations” (CP 214) have been heard in the PERC appeal. By order of PERC’s Unfair Labor Practice Manager, the issues in the PERC case were time-limited to a 6 month period⁹ and factually limited to only those events described in the amended complaint filed with PERC. *See CP 236-37*. These events pre-dated any of the supplemental facts set forth in Jordan’s Second Declaration submitted to the trial court (CP 174-177): removal of responsibilities, denial of adjustments to her work schedule to allow her to visit her doctor – a practice routinely approved prior to her filing the complaint in this case, denial of training opportunities, relocation to less desirable office space, assignment of duties outside her level of expertise, and efforts to decrease her skill base and thus marketability. None of this conduct fell within the strictly limited scope of the PERC proceeding. And this evidence substantiated a systemic and on-going campaign of age-discriminatory and retaliatory conduct towards Appellant that was not encompassed by the trial court’s ruling on summary judgment. The trial court erred in dismissing the case in its entirety.

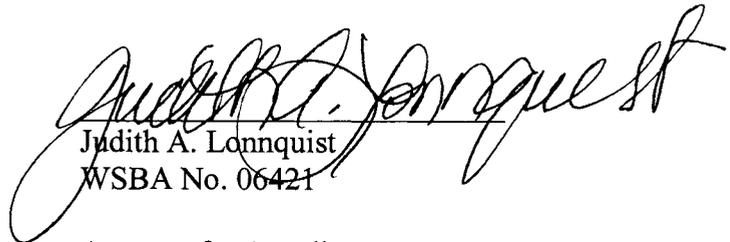
⁹ February 4 – August 4, 2004 (See CP 236-37).

CONCLUSION

For all of the foregoing reasons, Appellant respectfully requests that this Court reverse the decision of the court below and remand the case for trial.

Dated this 27th day of May, 2008.

LAW OFFICES OF
JUDITH A. LONNQUIST, P.S.



Judith A. Lonnquist
WSBA No. 06421

Attorney for Appellant

APPENDIX

Superior Court of the State of Washington For Thurston County

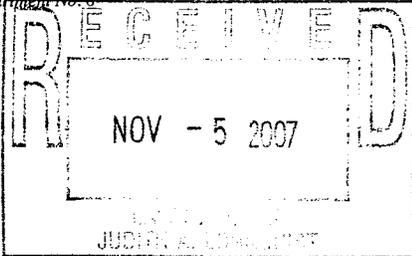
Paula Casey, Judge
Department No. 1
Richard A. Strophy, Judge
Department No. 2
Wm. Thomas McPhee, Judge
Department No. 3
Richard D. Hicks, Judge
Department No. 4
Christine A. Pomeroy, Judge
Department No. 5
Gary R. Tabor, Judge
Department No. 6
Chris Wickham, Judge
Department No. 7
Anne Hirsch, Judge
Department No. 8



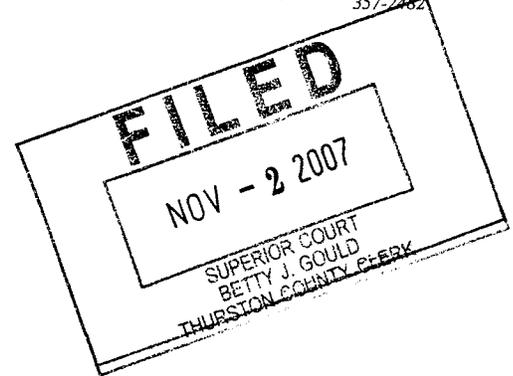
BUILDING NO. 2, COURTHOUSE
2000 LAKERIDGE DRIVE S.W. • OLYMPIA, WA 98502
TELEPHONE (360) 786-5560 • FAX (360) 754-4060

Christine Schaller
Court Commissioner
709-3201
Indu Thomas
Court Commissioner
709-3201

Marti Maxwell
Superior Court Administrator
Gary Carlyle
Assistant Superior
Court Administrator
Ellen Goodman
Drug Court Program
Administrator
357-2482



November 2, 2007



Newell D. Smith
Assistant Attorney General
800 Fifth Avenue Suite 2000
Seattle, WA 98104-3188

Judith A. Lonquist
Attorney at Law
1218 Third Avenue, Ste 1500
Seattle, WA 98101-3021

Re: *Jordan v State of Washington*,
Thurston County Superior Court No. 05-2-01016-6

Dear Counsel:

On August 11, 2006, after hearing argument on motion for summary judgment, this Court delivered an oral opinion granting the State's motion in some respects but deferring a ruling on collateral estoppel until after the Public Employment Relations Commission (PERC) decision became final.

Subsequently, Mr. Smith advised the Court that the PERC decision was now final. By letter dated August 31, 2007 this Court indicated it would issue a decision without further argument after submission of additional materials. Plaintiff's Supplemental Response to Defendant's Motion for Summary Judgment was filed September 20. Neither party requested further argument. The Court is now prepared to issue its decision.



November 2, 2007

Page 2

The primary case on point is Christensen v Grant County Hospital District No. 1, 152 Wn 2d 299, 96 P. 3d 957 (2004). That case also involved a prior PERC decision on issues common to the court and administrative proceedings. The Supreme Court said that

Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. [citation] It is distinguished from claim preclusion ‘in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted.’...

For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; ... (4) application of collateral estoppel does not work an injustice against whom it is applied.... Three additional factors must be considered under Washington law before collateral estoppel may be applied to agency findings: (1) whether the agency acted within its competence; (2) the differences between procedures in the administrative and court procedures; and (3) public policy considerations.” 152 Wn. 2d 299, 306-308.

In this case, the PERC examiner found (1) the use or non-use of blue publication request forms was not discriminatory; (2) Jordan failed to prove discrimination in the 12 projects cited by Jordan; (3) Jordan failed to prove discrimination based on no work assigned between February 5 and September 22, 2004; (4) Jordan failed to prove discrimination regarding her feeling blamed on a spring schedule publication; (5) no discrimination occurred as a result of micro-managing Jordan’s work; (6) Jordan failed to prove disparate treatment between her and Booth; Jordan failed to prove assignment of work to Booth was discriminatory; (7) Jordan failed to prove she was discriminatorily excluded from decisions on three occasions; (8) Jordan failed to show harm to her from any failure to pass on a compliment to her; (9) the employer did not discriminate against Jordan during a meeting with the college president; and (10) Jordan failed to show that Peres was part of any discriminatory treatment by the employer. According to the Examiner, Jordan “did not prevail in any of the 33 ... complaints of retaliation.” The findings adverse to Jordan are set forth in Findings of Fact 4- 15. Under Christensen, Jordan is barred from relitigating these facts if the 7 factors are present.

November 2, 2007

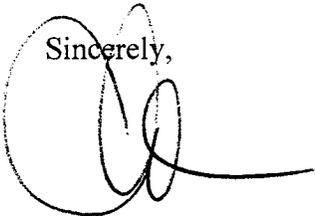
Page 3

The issues of discrimination in the PERC proceeding are identical to the issues presented in this proceeding. The earlier proceeding ended in a judgment on the merits. Plaintiff in this proceeding was the plaintiff in the administrative proceeding. The application of collateral estoppel does not work an injustice. The PERC acted within its competence. There is no material difference between the administrative procedures and the procedures of this court. Public policy considerations do not prevent the application of collateral estoppel.

Accordingly, this Court will grant Defendant's motion to bar relitigation of all issues resolved adversely to Plaintiff before PERC. If Plaintiff can present evidence to show other bases of discrimination, her case can proceed without evidence of the acts alleged and ruled upon by PERC. If there is no other evidence, Defendant is entitled to summary judgment.

Counsel may contact my judicial assistant for a date to present an appropriate order on notice to the opposing party. At the hearing on presentation, the Court will hear argument as to whether there is additional evidence to permit the case to go forward. The parties should be prepared to present an appropriate order on that issue as well.

Sincerely,

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a series of loops and a long horizontal stroke extending to the right.

Chris Wickham
Superior Court Judge

cc: Clerk, for filing

NO. 37178-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

CAROLE JORDAN,
Appellant

vs.

STATE OF WASHINGTON, d/b/a
LOWER COLUMBIA COMMUNITY COLLEGE,
Respondent.

FILED
COURT OF APPEALS
DIVISION II
MAY 27 PM 3:15
STATE OF WASHINGTON
BY DEPUTY

CERTIFICATE OF SERVICE

I, Judith A. Lonnquist, declare under penalty of perjury that on May 23, 2008, I caused to be served upon the below-listed parties, via the method of service listed below, a true and correct copy of Opening Brief on Behalf of Appellant, Carole Jordan and this document.

Washington State Court of Appeals,
950 Broadway, Ste 300 MS TB-06
Tacoma, WA 98402-4454

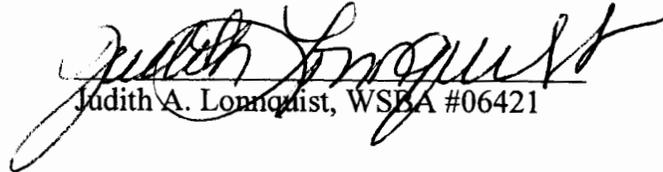
via legal messenger

Catherine Hendricks, Senior Counsel
Office of Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

via legal messenger

Dated this 23rd day of May, 2008.

LAW OFFICES OF
JUDITH A. LONNQUIST, P.S.


Judith A. Lonquist, WSEA #06421